

## **Unified Theory of Water Rights in Montana.**

My name is David Schmidt. I am the Principal and Senior Water Rights Specialist with Water Right Solutions, Inc. I have worked with water rights problems and with all types of water users in Montana for the past 33 years.

The committee should continue to communicate with the water user, as there is incredible frustration with its current administration of water rights, and the profound disconnect with the people using water on the ground.

HB831 is a law that allowed for the protection of existing water rights and created a water market to mitigate depletions and a method of banking water instream. In my view, the law does not need to be changed, or an unnecessary regulatory agency created that tax-payers cannot afford. If the existing change process were made to work, water markets would then be able to proceed in an orderly fashion.

Municipalities need to look to the future for municipalities, in terms of long-term growth. Water can be kept instream (in lieu of the cost of off stream storage). The stream/ river is the bank. While water is instream (the bank) it also benefits the fishery. Water can then be used in the future for needs that may arise

The use of instream flow to protect from abandonment also benefits the fishery. There have always been multiple beneficial uses of the same water right. It was Judge Lessley who changed the claim forms to differentiate between beneficial uses. The original forms correctly recognized multiple beneficial uses of the same water right.

## **Water Marketing**

Volume, not flow, is the key to water rights valuation and volume needs to be quantified

The adjudication is a colossal waste of funds if a volume is not decreed. The original justification for the adjudication of water rights, as I understand it, was to quantify what the state owned. Flow over time equals volume. If we do not have a volume decreed, we do not know what we have.

## **Valuation Factors**

Priority date, firm yield, water quality, water quantity must be adequate for the proposed new use. Is there a hydrologic thread between the historic use and the new use. Can the change be accomplished given the vagaries of the process? Sales contingent on DNRC approval are problematic due to extended time frames

Instream flow quantifies the volume consumptively used in the change process. This water is then available for future use, currently 30 years with 10 year renewals.

The legislature must require the water court to decree a volume at the final decree stage, The balance of the water right not used should be banked instream (the river/creek is the bank) and can be used for future use and for the financial benefit of the people who own the water right and have taken steps to protect that water right. The added benefit in the interim is that it keeps streams and rivers whole, without losing regulatory authority.

High growth areas aquifers should study the sustainable yield of the system prior to basin closures. MBMB seems to be making good progress in this direction

The reason for the adjudication of water rights, in the first place, was to quantify how much water we have. These water rights were recognized and confirmed by the 1972 Montana constitution

Exempt rights flow and volume could be lowered if the change process allows adequate water to be changed and does not discourage the use of public water supplies.

The DNRC seems to think it owns the water. It does not. The people of the State of Montana own the water, albeit in a metaphorical sense. Your constituents own the water right, which is real property. This constituent objects to my family's water rights historic volume being arbitrarily reduced by DNRC with something less than due process. What happened to carriage water? The diverted volume of surface water at the headgate over time is the measure of the water right. What happens to the water right when a change is terminated? Does it revert back to its historic basis? Just disappear? Evaporate? The DNRC cannot or will not give an answer to this question, although it has been asked many times.

The largest impediment to smart water banking is the unweildly and arbitrary change process, which essentially gives water away to downstream states. The glacial pace of the change process and the inability to make a decision creates a severe hardship for applicants and is used to stop reasonable development or all development. Community water supply wells should be encouraged. The change process drives developers to exempt wells.

I would urge the committee to once again carefully read **85-2-101 MCA**

**85-1-101. Policy considerations.** It is hereby declared as follows:

(1) The general welfare of the people of Montana, in view of the state's population growth and expanding economy, requires that water resources of the state be put to optimum beneficial use and not wasted.

(2) The public policy of the state is to promote the conservation, development, and beneficial use of the state's water resources to secure maximum economic and social prosperity for its citizens.

(3) The state, in the exercise of its sovereign power, acting through the department of natural resources and conservation, shall coordinate the development and use of the water resources of the state so as to effect full utilization, conservation, and protection of its

water resources.

(4) The development and utilization of water resources and the efficient, economic distribution thereof are vital to the people in order to protect existing uses and to assure adequate future supplies for domestic, industrial, agricultural, and other beneficial uses.

(5) The water resources of the state must be protected and conserved to assure adequate supplies for public recreational purposes and for the conservation of wildlife and aquatic life.

(6) The public interest requires the construction, operation, and maintenance of a system of works for the conservation, development, storage, distribution, and utilization of water, which construction, operation, and maintenance is a single object and is in all respects for the welfare and benefit of the people of the state.

(7) It is necessary to coordinate local, state, and federal water resource development and utilization plans and projects through a single agency of state government, the department of natural resources and conservation.

(8) The greatest economic benefit to the people of Montana can be secured only by the sound coordination of development and utilization of water resources with the development and utilization of all other resources of the state.

(9) Any attempt to gain control of or speculate on large quantities of ground water of the state of Montana is not in the interest of the people and is to be restricted.

(10) To achieve these objectives and to protect the waters of Montana from diversion to other areas of the nation, it is essential that a comprehensive, coordinated multiple-use water resource plan be progressively formulated, to be known as the "state water plan".

**History:** En. Sec. 2, Ch. 158, L. 1967; amd. Sec. 119, Ch. 253, L. 1974; R.C.M. 1947, 89-101.2; amd. Sec. 1, Ch. 631, L. 1979.

## **WAIVER OF STATUTORY TIMELINES**

I, \_\_\_\_\_ am an applicant for a

- ☐ **Permit to Appropriate Water**
- ☐ **Change of Appropriation Right**

Application No. \_\_\_\_\_

I am requesting additional time from the Department regarding my water right application. I agree to waive the following statutory timelines.\*

- ☐ **CHECK HERE IF AN OBJECTION WAS FILED TO YOUR APPLICATION**

Mont. Code Ann. §85-2-309 –

(1) If the department determines that an objection to an application for a permit or change approval under 85-2-402 states a valid objection, it shall hold a contested case hearing, pursuant to Title 2, chapter 4, part 6, on the objection within 60 days from the date set by the department for the filing of objections, after serving notice of the hearing by first-class mail upon the applicant and the objector. . .

and

Mont. Code Ann. §85-2-310 –

(1) The department shall grant, deny, or condition an application for a permit or change in appropriation right in whole or in part within 120 days after the last date of publication of the notice of application if no objections have been received and within 180 days if a hearing is held or objections have been received. However, in either case the time may be extended upon agreement of the applicant or, in those cases where an environmental impact statement must be prepared or in other extraordinary cases, may be extended by not more than 60 days upon order of the department. . . .

- ☐ **CHECK HERE IF NO OBJECTION WAS FILED TO YOUR APPLICATION**

Mont. Code Ann. §85-2-310 –

(1) The department shall grant, deny, or condition an application for a permit or change in appropriation right in whole or in part within 120 days after the last date of publication of the notice of application if no objections have been received and within 180 days if a hearing is held or objections have been received. However, in either case the time may be extended upon agreement of the applicant or, in those cases where an environmental impact statement must be prepared or in other extraordinary cases, may be extended by not more than 60 days upon order of the department. If the department orders the time extended, it shall serve a notice of the extension and the reasons for the extension by first-class mail upon the applicant and each person who has filed an objection as provided by 85-2-308.

I have received a copy of Mont. Code Ann. §§85-2-309 and -310 and have had an opportunity to review it. I have read the above waiver and understand it. I have had the opportunity to obtain advice of my own legal counsel before signing this waiver.

DATE: \_\_\_\_\_

\_\_\_\_\_  
Authorized Representative

\* **BY ACCEPTANCE OF THIS WAIVER, THE DEPARTMENT DOES NOT AGREE THAT THE STATUTORY TIMELINES HEREIN REFERENCED ARE MANDATORY.**

## DNRC OWNERSHIP UPDATE SEVERED WATER RIGHT

A water right is considered severed, if the water right is being removed from the land. A severed water right does not involve a land sale.

If there is a land sale, and an appurtenant water right will not go with the sale, complete a Form 642, Exempted (Reserved) Water Right.

If only a portion of the water right is being severed, complete a Form 641 Divided Interest.

Complete one form for each water right that will be severed.

Contact your local DNRC Water Resources Regional Office if you have any questions.

**Filing Fee \$50.00**

### FOR DEPARTMENT USE ONLY

Rec'd Date _____	
Rec'd By _____	
Fee Rec'd \$ _____	Check No. _____
Payor _____	
Refund \$ _____	Date _____
Deposit Receipt # _____	

1. **WATER RIGHT NUMBER BEING SEVERED** \_\_\_\_\_

2. **CURRENT WATER RIGHT OWNER** \_\_\_\_\_

MAILING ADDRESS \_\_\_\_\_

CITY \_\_\_\_\_ STATE \_\_\_\_\_ ZIP \_\_\_\_\_

PHONE \_\_\_\_\_ EMAIL \_\_\_\_\_

3. **NEW WATER RIGHT OWNER** \_\_\_\_\_

MAILING ADDRESS \_\_\_\_\_

CITY \_\_\_\_\_ STATE \_\_\_\_\_ ZIP \_\_\_\_\_

PHONE \_\_\_\_\_ EMAIL \_\_\_\_\_

4. **PROVIDE A COPY OF THE LEGAL DOCUMENT SEVERING THE WATER RIGHT.**

5. **PROVIDE A MAP** detailing the location of the place of use for the water right being severed. An aerial photo is preferred. You may also use a scaled map, county plat or quad map showing township and range, section corners, and a north arrow.

5. **CURRENT WATER RIGHT OWNER SIGNATURE**

I CERTIFY UNDER PENALTY OF FALSE SWEARING THAT THE INFORMATION APPEARING HERE IS TO THE BEST OF MY KNOWLEDGE TRUE AND CORRECT.

Current Water Right Owner Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Current Water Right Owner Signature: \_\_\_\_\_ Date: \_\_\_\_\_

6. **NEW WATER RIGHT OWNER SIGNATURE**

I CERTIFY UNDER PENALTY OF FALSE SWEARING THAT THE INFORMATION APPEARING HERE IS TO THE BEST OF MY KNOWLEDGE TRUE AND CORRECT.

New Water Right Owner Signature: \_\_\_\_\_ Date: \_\_\_\_\_

New Water Right Owner Signature: \_\_\_\_\_ Date: \_\_\_\_\_

### IMPORTANT NOTE

A severed water right cannot be used at a different point of diversion, place of use, place of storage, or purpose other than stated in the original water right until a change application has been authorized by the DNRC.

Print Form